Supreme Court, U. S.
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 79-1235.

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, INC., D/B/A INTERNATIONAL BROTHERHOOD OF POLICE OFFICERS,
PETITIONER,

v.

CENTRAL BROADCASTING CORPORATION,
RESPONDENT.

Brief for the Respondent in Opposition to the Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

EVAN T. LAWSON,
HOWARD J. WAYNE,
LAWSON & WAYNE,
99 High Street,
Boston, Massachusetts 02110.
(617) 542-4010

Of Counsel:
MARK L. ROSEN, ESQUIRE,
SIFF & NEWMAN, P.C.,
233 Broadway,
New York, New York 10007.

ADDISON C. GETCHELL & SON, INC. - THE LAWYERS' PRINTER - BOSTON

Table of Contents.

Questions presented	1
Statement of the case	2
A. Procedural history	2
B. Facts	2
Argument	9
A. The Petition should not be granted because the decision of the Supreme Judicial Court rests upon independent, adequate non-federal grounds	9
B. The Supreme Judicial Court of Massachusetts correctly applied the applicable principles of federal law	13
1. The union is a public figure	13
2. The union did not show a genuine issue of fact as to actual malice	17
Conclusion	23
Appendix A	24

Table of Authorities Cited.

CASES.

Associated Press v. Walker, 388 U.S. 130 (1967)	14n.
Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967)	19n., 20
Berman v. Drake Motor Lines, Inc., Mass. App. Ct. Adv. Sh. (1978) 678	19
Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930)	10
Cepeda v. Cowles Magazine & Broadcasting, Inc., 392 F. 2d 417 (9th Cir. 1968), cert. denied, 393 U.S. 840 (1968)	14n.

Commonwealth Bank & Trust Co. v. Plotkin, 371 Mass. 218 (1976) 18
Community National Bank v. Dawes, 369 Mass. 550 (1976) 17, 18
Dixon v. Duffy, 342 U.S. 33 (1951) 10
El Paso Times, Inc. v. Trexler, 447 S.W. 2d 403 (Tex. Sup. 1969) 14n.
Enterprise Irrigation District v. Farmers Mutual Canal Co., 243 U.S. 157 (1917) 10
Farley v. Sprague, Mass. Adv. Sh. (1978) 385 18
Fay, Spofford & Thorndike, Inc. v. Massachusetts Port Authority, Mass. App. Ct. Adv. Sh. (1979) 605 18
Foss v. Hildreth, 10 Allen (92 Mass.) 76 (1865) 12
Fox Film Corp. v. Muller, 296 U.S. 207 (1935) 10
Fram v. Yellow Cab Company of Pittsburgh, 380 F. Supp. 1314 (W.D. Pa. 1974) 16
Garrison v. Louisiana, 379 U.S. 64 (1964) 20, 22
Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 12, 13, 14, 15, 16, 20
Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, 398 U.S. 6 (1970) 20, 22
Guitar v. Westinghouse Electric Corp., 538 F. 2d 309 (2d Cir. 1976) 14n.
Hammerstein v. Superior Court of California in and for the County of Los Angeles, 340 U.S. 622 (1951) 10
Henry v. Collins, 380 U.S. 356 (1965) 20
Henry v. Mississippi, 379 U.S. 443 (1965) 10
Herb v. Pitcairn, 324 U.S. 117 (1945) 12

Hotchner v. Castillo-Puche, 551 F. 2d 910 (2d Cir. 1977), cert. denied, 434 U.S. 834 (1977) 12
Hotchner v. Castillo-Puche, 404 F. Supp. 1041 (S.D. N.Y. 1975) 14n.
Hurley v. Northwest Publications, Inc., 273 F. Supp. 967 (D. Minn. 1967), aff'd on opinion below, 398 F. 2d 346 (8th Cir. 1968) 20-21
Hutchinson v. Proxmire, — U.S. —, 99 S. Ct. 2675 (1979) 16
Iroquois Transport Co. v. De Laney Forge and Iron Co., 205 U.S. 354 (1906) 10
John B. Deary, Inc. v. Crane, 4 Mass. App. Ct. 719 (1976) 18
Joyce v. George W. Prescott Pub. Co., 348 Mass. 790 (1965) 12
Klahr v. Winterble, 4 Ariz. App. 158, 418 P. 2d 404 (1965) 14n.
Letter Carriers v. Austin, 418 U.S. 264 (1974) 15, 16, 22
Linn v. United Plant Guard Workers, 383 U.S. 53 (1966) 15, 16
Malerba v. Newsday, — App. Div. 2d —, 406 N.Y.S 2d 552 (1978) 14n.
Miller v. News Syndicate Co., 445 F. 2d 356 (2d Cir. 1971) 21
New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 20, 21, 22
O'Brion, Russell & Co. v. LeMay, 370 Mass. 243 (1976) 18, 19
Pauling v. Globe-Democrat Pub. Co., 362 F. 2d 188 (8th Cir. 1966) 14n.

Perry v. Columbia Broadcasting System, Inc., 499 F. 2d 797 (7th Cir. 1974), cert. denied, 419 U.S. 883 (1974) 14n.

Rosenblatt v. Baer, 383 U.S. 75 (1966) 19n., 20

Shapiro Equipment Corp. v. Morris & Son Construction Corp., 369 Mass. 968 (1976) 18, 19

Smith v. Suburban Restaurants, Inc., Mass. Adv. Sh. (1978) 531 18

St. Amant v. Thompson, 390 U.S. 727 (1968) 19n., 20, 22

Stetson v. Board of Selectmen of Carlisle, 369 Mass. 755 (1976) 19

Stone v. Essex County Newspapers, Inc., 367 Mass. 849 (1975) 13, 14, 20

Thornhill v. Alabama, 310 U.S. 88 (1940) 14-15

Time, Inc. v. Firestone, 424 U.S. 448 (1976) 16

Time, Inc. v. Johnston, 448 F. 2d 378 (4th Cir. 1971) 14n.

Time, Inc. v. Pape, 401 U.S. 279 (1971) 20

Trails West, Inc. v. Wolff, 32 N.Y. 2d 207 (1973) 21

Wagner v. Lectrox Corp., 4 Mass. App. Ct. 815 (1976) 18, 19

Walker v. Pulitzer Publishing Company, 394 F. 2d 800 (8th Cir. 1968) 21

Williams v. Kaiser, 323 U.S. 471 (1945) 10

Wolston v. Reader's Digest Association, Inc., — U.S. —, 99 S. Ct. 2701 (1979) 16

Young v. Ragen, 337 U.S. 235 (1949) 10

CONSTITUTIONAL PROVISION AND STATUTES.

United States Constitution, First Amendment 11, 12

28 U.S.C. § 1257(3) 9

Mass. G.L. c. 231, § 118 2n.

MISCELLANEOUS.

19 ALR 3d (August 1978) 14n.

J. Nolan, Civil Practice, 9 Mass. Prac., § 421 (1979 Supp.) 18

Mass. R. Civ. P. 56 2, 20n., 24-26

Restatement (Second) of Torts, § 566 (1977) 11

Supreme Court Rule 19 9

10 Wright and Miller, Federal Practice and Procedure, § 2738 19

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Brief for the Respondent in Opposition to the Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Questions Presented.

1. Does the decision of the Supreme Judicial Court rest upon independent adequate non-federal grounds?
2. Has the Supreme Judicial Court decided a federal question of substance not theretofore determined by this Court, or decided it in a way probably not in accord with applicable decisions of this Court?

Statement of the Case.

A. Procedural History.

This is a defamation action for money damages in the amount of Three Million ($3,000,000.00) Dollars brought by the National Association of Government Employees, Inc. d/b/a International Brotherhood of Police Officers (the Union) against Central Broadcasting Corporation (the Station) (P. 45-53).

The Station's Motion for Summary Judgment under Mass. R. Civ. P. 56 was denied without finding or opinion by a judge of the Massachusetts Trial Court on September 12, 1978 (P. 28).[1] Thereafter, the Station obtained leave to prosecute an interlocutory appeal which was heard by the Supreme Judicial Court of Massachusetts.[2] The Supreme Judicial Court reversed and ordered entry of a judgment dismissing the action on November 13, 1979 (P. 40). It held that the statements in issue were not defamatory because they were expressions of "opinion on disclosed or assumed facts" (P. 32); that the statements were "too amorphous a characterization to be actionable" (P. 35), and that there was no genuine issue as to the material fact of knowledge of falsity or reckless disregard of the truth in making them (P. 37). This Petition for a Writ of Certiorari followed.

B. Facts.

The Station operates Radio Station W.A.R.E. in the Town of Ware. It is the only locally-owned radio station servicing

[1] The Massachusetts Rules of Civil Procedure track the Federal Rules. The text of Massachusetts Rule 56 is set out in full in Appendix A, *infra* at 24.

[2] A Massachusetts statute, G.L. c. 231, § 118, provides for appellate relief from interlocutory orders of the Trial Court (P. 28).

the Town's approximately 8,000 residents. As a part of its community service, the Station provides a regularly-scheduled open forum radio program entitled "Sound Off." Members of the community are invited to telephone in their questions, views and opinions as to matters of current public interest and concern which are broadcast "live" to the public (P. 90).[3]

The announcer of the "Sound Off" program was provided with a standard ten-second delay system and "abort" button. She had ten seconds to decide whether to prevent any caller's ongoing conversation from being broadcast (P. 90).

During late 1976 through January, 1977, the Union was negotiating a new labor contract with the Town of Ware. The collective bargaining process was the subject of intense local interest and was a constant topic of debate in the media as well as at public and private meetings (P. 75-76).

After much debate and discussion, an agreement was reached which was signed on January 25, 1977, by the Union and all the Ware Selectmen except the Chairman of the Board, Abraham Goodman (Goodman) (P. 76). The agreement required approval and funding by the voters of the Town of Ware and was scheduled to come before a Special Town Meeting on February 22, 1977 (P. 69-70).

During the first week of February, 1977, Goodman received a letter from the Executive Director of the Union warning that Goodman was prohibited from speaking out publicly against the contract; demanding that he "must support it"; and threatening that his failure to do so "could result in enormous and needless outpouring of taxpayers'

[3] Additionally, the "Sound Off" program has featured interviews with such public figures as Senator Kennedy, Governor Dukakis and State Treasurer Crane (P. 91-92).

monies in legal action and possibly against you personally" [sic] (P. 76, 79-80).[4]

On February 16, 1977, the Ware River News reported in a front page article that the Union had accused the Station of bias against it in a complaint to the Federal Communications Commission (P. 76-77). The text of the Union's letter of complaint to the FCC was released to the press by the Union and was reproduced in the newspaper (P. 81-84). It accused the Station of conducting a "vocal vendetta" against the Union including "almost a daily and constant cacophony of police misinformation, unfounded allegations of police procedures and actions, and deliberate distortions of fact." The Union accused two officials of the Station of demanding that the police department "subvert the law" and that "failure to comply . . . would bring about the molding of public opinion against a pending police contract, subversion of a governmental process (town meeting), interference with a contractual agreement, and otherwise force certain police officers to compromise their oaths of office." The letter concluded with a demand that the FCC conduct a "full-scale" investigation to determine if the Station should retain its license. The newspaper article also related the Union's demand upon Goodman and his response which "rejected the IBPO position as an infringement of his First Amendment rights" (P. 82-84). The newspaper published an editorial criticizing the Union's actions (P. 85-86).

On February 17, 1977, Goodman called "Sound Off," identified himself, and expressed his views concerning the efforts of the Union to prevent him from informing the voters and

[4] This threat was characterized by the Supreme Judicial Court as "exceedingly rash and ill-advised" in view of its decisions on the subject in 1974 and 1976, as well as a decision rendered in 1978 after the letter was written (P. 29, fn. 3). Compare P. 14, fn. 10.

people of Ware of his position and the Union's attack on the Station (P. 90-91).

Caller: This is Abe Goodman.

Announcer: How do you do Sir.

Caller: Well, I'm very angry at the moment.

Announcer: Why is that?

Caller: Because we're supposed to be living in a free and a democratic country and I don't think we are. This episode with the police union making demands on the station as well as myself, I want to go on record publicly that I will support the station a hundred percent.

Announcer: Thank you very much.

Caller: Because, if we do not get together and stop the inroad of communism, something will happen.

Announcer: Well, I agree with everything you're saying, I also think that, um, Roby Maynard, the editor of the Ware River News came out with a rather strong comment in his kaleidoscope column and I think it does go back to the fact that it's up to the Ware taxpayers and the Ware residents to handle the affairs of the Town of Ware and that's what we elected you to do and if you can't speak. . . .

Caller: Well, that's right. I agree with you. Talking about the taxpayers and the residents and home owners publicly, I would like to ask all the people that possibly can to come to the special town meeting and as far as being intimidated by the Police Department from not voting the way they see fit, I intend to ask for a secret ballet [sic], but it's foolish for me to ask for anything unless I get support.

Announcer: Right.
(P. 92-94).

Goodman then stated his opinion that the effect of the agreement would be to raise the tax rate of the Town and reiterated his belief that, as the Chairman of the Board of Selectmen, he should be free to express his opinion to the voters (P. 94-96).

Goodman concluded with a return to his analogy between the tactics of the Union and communistic suppression of free speech.

Announcer: Well, if some guy can come into the Town from God knows where and talk on the Town Hall floor at a town meeting then certainly the Chairman of the Board of Selectmen who is elected by the taxpayers of Ware certainly should be allowed to speak on the Town Hall floor.

Caller: Well, I feel. . . .

Announcer: But, of course, ah, you have to look at it this way, if you do talk and they arrest you, at least you get a first hand look at the lockup. (Laughs)

Caller: Well, that's right, but I should be given the opportunity to express my opinion why I feel one way or another.

Announcer: I agree with you and I hope that you, I just hope a lot of lot [sic] of people turn out for this special town meeting.

Caller: Well, I hope so. *But, again, I want to say that if there is anything I can help the station towards fighting the inroads of communism which in this particular case is the union, police union, I will be glad to help.*

Announcer: Well, I thank you very much, Sir and I just . . .

Caller: You're welcome.

Announcer I just think that, uh, what we all have to do is just be very big people and not stoop to a very low level.

Caller: That's right.

Announcer: O.K. Thank you very much for your call.
(P. 96-97.) (Emphasis added.)

At the end of the program, an unidentified caller aired his views. He expressed support for the Union and gave his opinion on Goodman's remarks. The caller was immediately challenged by Murphy. As the following transcript of that "on-air" conversation reveals, Murphy believed that Goodman had not accused the Police Department of being communists.

Caller: He made an outrate [sic] statement that the Police Department was a Communist, almost a Communist rule.

Announcer: No, he didn't. You interpreted it incorrectly.

Caller: . . . Goodman is a Police Commissioner.

Announcer: Right.

Caller: Now, if his Department is Communist and he is the leader of this Department then he's a Communist. All right?

Announcer: O.K. We're not going to get anywhere in this conversation.

Caller: No, obviously we're not.

Announcer: O.K. thank you for the call. First of all, it seems that I can't argue with you because you won't allow me the time to speak on my program, I'll take the time now. *Mr. Goodman did not say anything about the Police Department being Communist. What he said was the infringement upon a basic American*

Democratic right, and that is the right to free speech, is being infringed upon by this union, this International Union of Brotherhood of Police Officers that is coming in, and first of all telling the Chairman of the Board of Selectmen, an elected official of the taxpayers, that he cannot speak, and secondly, is now saying that the radio station, which is licensed to serve community needs is not doing that and is now on a, I believe the word is vocal vendetta. There is [sic] so many big words in that thing I hope the F.B.C. [sic] has a very good attorney to interpret it. *However, as far as Mr. Goodman saying anything about the Police Department being Communist, you're incorrect. What he was saying is that this union is attempting to subvert the right of free speech* and as far as having the lowest crime rate, fine, terrific, I think that's great. . . . And the radio station and Abe Goodman and anybody else who wants to get involved in it cannot stop the voters from passing that Contract if they want to pass it. Nor can we say, everybody go out and vote for it and because it's an individual matter and it's up to the individual to decide which way he or she wants to vote and the only thing we can do is ask all of you to get out and vote. And that's the end of Sound Off. Have a very nice day. I'll be back tomorrow at 12:15 with State Senator Robert Wetmore.

(P. 99-101.) (Emphasis added.)

On February 17, 1977, the Station offered the Union the opportunity to appear on "Sound Off" and air its views on February 21, the day before the Special Town Meeting. The Union refused (P. 77-78, 87-88).

Argument.

A. The Petition Should Not Be Granted Because the Decision of the Supreme Judicial Court Rests upon Independent Adequate Non-Federal Grounds.

The statutory basis for this Court's Certiorari jurisdiction provides that "[f]inal judgments or decrees rendered by the highest court of a State . . . may be reviewed by the Supreme Court . . . [b]y writ of certiorari . . . where any title, right, privilege or immunity is . . . claimed under the Constitution . . . of the United States." 28 U.S.C. § 1257(3). The purpose of the statute is reflected in Rule 19 of this Court which provides that among the "special and important reasons" warranting exercise of Certiorari jurisdiction are cases where a state court "has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

Consequently, a Petition for a Writ of Certiorari will be denied where the judgment to be reviewed is supportable as a matter of state law.

> It is true that the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the state; that this Court's power to review decisions of state courts is limited to their decisions on federal questions [footnote omitted]; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled prin-

> ciples or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this court [footnote omitted].

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 680 (1930) and cases cited in footnotes 6 and 7.

See also *Dixon v. Duffy,* 342 U.S. 33, 34 (1951) ("judgment may rest on a non-federal ground, thus calling for dismissal of our writ of certiorari"); *Young v. Ragen,* 337 U.S. 235, 238 (1949) ("Of course we do not review state decisions which rest upon adequate nonfederal grounds"); *Henry v. Mississippi,* 379 U.S. 443, 446 (1965) ("It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds"); *Hammerstein v. Superior Court of California in and for County of Los Angeles,* 340 U.S. 622, 623 (1951) ("If their judgment rests on an adequate state ground, we, of course, will not review those judgments"); *Williams v. Kaiser,* 323 U.S. 471, 473 (1945) ("Whatever the grounds of that decision it is binding on us insofar as state law is concerned"); *Iroquois Transport Co. v. De Laney Forge and Iron Co.,* 205 U.S. 354, 360 (1906) (case "presents a question of state law, upon which the judgment of the state court is final and conclusive").

Moreover, if the state court has based its judgment upon both state and federal grounds, either of which would be dispositive, this Court will not issue the Writ. *Henry v. Mississippi, supra,* and other cases cited therein; *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935); *Enterprise Irrigation District v. Farmers Mutual Canal Co.,* 243 U.S. 157, 164 (1917).

The unanimous decision of the Supreme Judicial Court rests upon three independent lines of authority, any of which compels dismissal of the Union's action. The Supreme Judicial Court held that Goodman's references to "communism" did not give the Union a cause of action for defamation because they were statements of opinion on disclosed or assumed facts (P. 32-35) and, in any event, were too amorphous a characterization to be actionable (P. 35-36). Additionally, the Court held that even assuming the statements to be defamatory, the Union was a public figure and there was no genuine issue as to the Station's knowledge of falsity or reckless disregard of the truth because the Union had failed to present evidence warranting a finding of actual malice (P. 37-40).[5]

In concluding that the references to "communism" were non-actionable statements of opinion, the Court relied upon § 566 of Restatement (Second) of Torts (1977) (P. 33, 34, fn. 8, 35). Similarly, the Court relied upon fundamental principles of libel law, in holding that a charge of "communism" was too vague a characterization to be actionable (P. 35). Of course many of the cases cited include First Amendment discussions as it is virtually impossible to treat the law of defamation without reference to the strictures of the First Amendment, but the Court makes clear that if its result was not "constitutionally required, we would reach the same result, believing that the action is plainly without merit" (P. 39). Thus, even if the Supreme Judicial Court's view of federal law is erroneous, its statement that it would reach the same result regardless of federal constitutional requirements compels denial of the Union's petition.

> Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments not

[5] The Union appears to have misspoken in its statement of the Questions Presented where it asserts that the Supreme Judicial Court held it to be "a private figure thereby ruling inapplicable the 'active malice' standard" (P. 2). We discuss the state law basis for the Court's holding on the quantum of evidence necessary to defeat a Motion for Summary Judgment at part B.2., *infra.*

> to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal law, our review could amount to nothing more than an advisory opinion.

Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945).

While the statement that "an assertion that cannot be proved false cannot be held libelous" (P. 36) may have arisen in the context of First Amendment analysis, see *Hotchner v. Castillo-Puche,* 551 F. 2d 910 (2d Cir. 1977), *cert. denied,* 434 U.S. 834 (1977), it also flows logically from the common law of defamation which establishes that truth is a defense, *Foss v. Hildreth,* 10 Allen (92 Mass.) 76 (1865); *Joyce v. George W. Prescott Pub. Co.,* 348 Mass. 790 (1965).

Surely, the failure of the Supreme Judicial Court of Massachusetts to follow the common law of the District of Columbia relied upon by the Union (P. 12) presents no federal question to be reviewed by this Court.

In *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974) this Court made clear that the standard of liability for defamation was to be established by the individual states, so long as they did not trench upon the First Amendment.

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

418 U.S. at 347.

The Union, asserting that it is a private figure (P. 15, 17), complains in essence that the Supreme Judicial Court has afforded greater protection against defamation actions for publishers and broadcasters than it finds in the decisions of this Court. Even assuming such to be the case, it is clear that a state court's decision to make state law favor freedom of expression at the expense of a plaintiff in a defamation action is not a federal question to be reviewed by this Court.

B. The Supreme Judicial Court of Massachusetts Correctly Applied the Applicable Principles of Federal Law.

1. *The Union is a public figure.*

In *Stone v. Essex County Newspapers, Inc.,* 367 Mass. 849 (1975), the Supreme Judicial Court adopted the test for determining whether a plaintiff in a defamation action is a public figure set forth by this Court in *Gertz v. Robert Welch, Inc.,* 418 U.S. 323 (1974).[6]

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions. . . . We would not lightly assume that a citizen's participation in community and professional af-

[6] In *Stone,* the Court held that "the question whether the plaintiff is a public official or a public figure is one for the court to answer whenever (a) all of the facts bearing thereon are uncontested or agreed by the parties. . . ." 367 Mass. at 862. The factual underpinnings for such determination are uncontested in this case. The Union's affidavit in opposition sets forth its conclusion that "it should not be considered a public figure" (P. 104), but it does not and cannot contest the fact that it had chosen to publicly attack Goodman and the Station in an attempt to stifle opposition to its contract as well as actively participate in the debate surrounding the collective bargaining process and approval of the contract. Moreover, the Union sought and received access to the media to express its views (P. 81-84).

fairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, any individual should not be deemed a public personality for all aspects of his life. *It is preferable to reduce the public-figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.*

Gertz, supra at 351-353, quoted in *Stone, supra* at 866 (emphasis added.)

The Courts have consistently held in defamation actions that plaintiffs with varying degrees of prominence were "public figures." Included within the public figure category have been student leaders, private citizens who attempt to influence public opinion, authors, athletes, entertainers, and those involved in police-related activities.[7] Furthermore, the right of free expression concerning labor disputes has long been specially recognized. *Thornhill v. Alabama,* 310 U.S. 88,

[7] *El Paso Times, Inc. v. Trexler,* 447 S.W. 2d 403 (Tex. Sup. 1969) (university professor and leader of anti-war rally); *Klahr v. Winterble,* 4 Ariz. App. 158, 418 P. 2d 404 (1965) (member of student senate); *Associated Press v. Walker,* 388 U.S. 130 (1967) (former general and espouser of right-wing causes); *Pauling v. Globe-Democrat Pub. Co.,* 362 F. 2d 188 (8th Cir. 1966) (noted scientist and peace movement activist); *Hotchner v. Castillo-Puche,* 404 F. Supp. 1041 (S.D. N.Y. 1975) (author of a book entitled Papa Hemingway); *Guitar v. Westinghouse Electric Corp.,* 538 F. 2d 309 (2d Cir. 1976) (author of a book on property restrictions); *Time, Inc. v. Johnston,* 448 F. 2d 378 (4th Cir. 1971) (a former NBA player); *Cepeda v. Cowles Magazine & Broadcasting, Inc.,* 392 F. 2d 417 (9th Cir 1968), *cert denied,* 393 U.S. 840 (1968) (a major league baseball player); *Perry v. Columbia Broadcasting System, Inc.,* 499 F. 2d 797 (7th Cir. 1974), *cert. denied,* 419 U.S. 883 (1974) (Lincoln Perry a/k/a "Stepin Fetchit"); *Malerba v. Newsday,* — App. Div. 2d —, 406 N.Y.S. 2d 552 (1978); 19 ALR 3d (August 1978 Supp. P. 82 fn. [d]).

100-103 (1940); *Letter Carriers v. Austin,* 418 U.S. 264 (1974); *Linn v. United Plant Guard Workers,* 383 U.S. 53 (1966).

Here, the Union thrust itself to the forefront of the public controversy surrounding the collective bargaining process in order to influence the resolution of the items involved. See *Gertz, supra* at 345. It had been actively engaged in the collective bargaining process and the public debate leading to the contract between it and the Town of Ware. Its officials were attempting to persuade the voters of the Town to fund the contract and to publicly approve its terms and conditions. In Mr. Justice Powell's words, public figure status is attained ". . . by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention. . . ." *Gertz, supra* at 342.

Indeed, the Union did more than participate in the particular controversy giving rise to the defamation, it created the controversy by the deliberate employment of scare tactics in an attempt to silence opposition to public approval and funding of its contract.[8]

The Union asserts that it is not a public figure for purposes of this case because its "role was strictly limited to fulfilling its obligation as the bargaining representative, and providing certain benefits for its local membership" (P. 17). This claim is belied by the Union's admission that its officials and members were acting to persuade the voters of Ware to vote in favor of its proposed contract, and the evidence of newspaper coverage (P. 16). Moreover, the Union did not deny the fact, set forth in the Murphy affidavit, that the Union made

[8] Instituting this three million dollar libel action is more of the same tactic of cowing the opposition with outlandish threats rather than meeting it in debate on the merits. The Supreme Judicial Court considered the Union's damage claim to be so excessive as to question the propriety of Union counsel's conduct in signing the pleading. (P. 40 fn. 18).

public its letters threatening Goodman if he spoke out against the contract and complaining to the FCC about the Station's supposed anti-Union stance in the controversy (P. 91). In view of the Union's efforts to campaign in favor of its contract in the public press and elsewhere, it is frivolous for the Union to liken itself to the petitioner in *Gertz* who "played a minimal role . . . never discussed [any of the matters in issue] with the press and was never quoted as having done so." 418 U.S. at 352. On the undisputed facts in this case it is clear that the Union "thrust [itself] into the vortex of this public issue" and "engage[d] the public's attention in an attempt to influence its outcome." *Id.*

The Union's reliance upon *Time, Inc. v. Firestone,* 424 U.S. 448 (1976); *Hutchinson v. Proxmire,* — U.S. —, 99 S. Ct. 2675 (1979) and *Wolston v. Reader's Digest Association, Inc.,* — U.S. —, 99 S. Ct. 2701 (1979) (P. 16) is similarly misplaced. The Court was careful to point out that Mrs. Firestone did not resort to the press in an attempt to influence the resolution of her case. *Firestone,* 424 U.S. at 454, fn. 3. The *Hutchinson* and *Wolston* cases are similarly devoid of any suggestion that the plaintiffs chose to bring their side of the controversy into the public forum in an attempt to mold public opinion in their favor.

In short, this public employee union launched a public attack upon the Station and Goodman as well as engaged in a public campaign all to influence the resolution of a public controversy. Its "complete and enthusiastic involvement in the . . . controversy" cannot be denied and compels a finding that it is a public figure for purposes of this case. *Fram v. Yellow Cab Company of Pittsburgh,* 380 F. Supp. 1314, 1334 (W.D. Pa. 1974); *Gertz, supra; Linn v. United Plant Guard Workers, supra; Letter Carriers v. Austin, supra.*

2. *The Union did not show a genuine issue of fact as to actual malice.*

In spite of the obvious fact that the quantum of evidence necessary to create a genuine issue of material fact in connection with a Motion for Summary Judgment in a state court following state rules of civil procedure is clearly a matter of state law, the Union appears to claim that the Station's Motion for Summary Judgment should have been denied as a matter of federal law (P. 18-26). Nonetheless we believe that the cases discussed in Part A, *supra* require that the sufficiency of the evidence be measured first against state law and then against constitutional standards since this Court has held that the states are free to regulate the standard of liability for defamation so long as they do not impinge upon the protection granted to freedom of expression by the First Amendment. *Gertz, supra.*

The Massachusetts Rule concerning the adequacy of the evidence to support a Motion for Summary Judgment is quite clear. The Supreme Judicial Court has decided that once the moving party shows the absence of an issue of material fact, the opposing party must allege particular facts to avoid summary judgment.

> The inference to be drawn from the burden placed on the moving party is that his failure to establish the absence of a genuine issue of material fact must, without more from his opponent, defeat his motion. . . . On the other hand, *if the moving party shows that there is no issue for trial, the opposing party must respond and allege specific facts which establish that there is a genuine, triable issue, or summary judgment (if appropriate in all other respects) will be entered against him.* The parties' respective burdens are designed to discourage both "utterly unjustified motions for summary judgment" and "specious denials or sham defenses."

Community National Bank v. Dawes, 369 Mass. 550, 554 (1976) (emphasis added, citations omitted).

See also *Shapiro Equipment Corp. v. Morris & Son Construction Corp.*, 369 Mass. 968 (1976); *O'Brion, Russell & Co. v. LeMay*, 370 Mass. 243 (1976); *Commonwealth Bank & Trust Co. v. Plotkin*, 371 Mass. 218 (1976); *Smith v. Suburban Restaurants, Inc.*, Mass. Adv. Sh. (1978) 531; *Wagner v. Lectrox Corp.*, 4 Mass. App. Ct. 815 (1976); *John B. Deary, Inc. v. Crane*, 4 Mass. App. Ct. 719, 722-724 (1976); *Fay, Spofford & Thorndike, Inc. v. Massachusetts Port Authority*, Mass. App. Ct. Adv. Sh. (1979) 605, 610; J. Nolan, *Civil Practice*, 9 Mass. Prac. §421 at Supp. 45-46 (1979 Supp.).

The opposing party's burden of showing a genuine issue of material fact will only be met by the proffer of specific facts. Conclusory allegations which do not show their factual underpinnings will not avail. *Community National Bank v. Dawes, supra* at 554; *Commonwealth Bank & Trust Co. v. Plotkin, supra* at 221-222. Moreover, the opposing party may rely upon inferences to be drawn from the facts contained in the pleadings, affidavits and other material only when the opposing party has clearly set forth subsidiary facts in his pleadings or affidavits. *Community National Bank v. Dawes, supra* at 559, fn. 8; *Farley v. Sprague*, Mass. Adv. Sh. (1978) 385, 392.[9]

The Union did not traverse the factual allegations contained in the Station's affidavits in support of its Motion for Summary Judgment. The Union's only attempt to present additional facts bearing on the malice issue is contained in paragraph 9 of its affidavit which is made "on information and

[9] The Supreme Judicial Court's reference to federal summary judgment decisions in the opinion below does not indicate that it was applying federal law. Because the Massachusetts Rules of Civil Procedure track the Federal Rules, the Court refers to federal decisions to aid in interpreting the Massachusetts Rules. At the same time, the Court rejects those federal decisions which it does not find in harmony with its view of the proper workings of its rules. See, *Community National Bank v. Dawes, supra* at 553-556.

belief" (P. 104). It claims that the host of "Sound Off" knew of the Union's excellent reputation but deliberately and recklessly allowed the statement to be broadcast.[10] The general rule in Massachusetts is that "[a]ll affidavits or portions thereof made on information and belief, as opposed to personal knowledge, are to be disregarded in considering a motion for summary judgment." *Shapiro Equipment Corp. v. Morris & Son Construction Corp.*, 369 Mass. 968 (1976). Assuming that the Court could in its discretion accept any facts asserted in paragraph 9 because there was no motion to strike the matters alleged on information and belief, see *Stetson v. Board of Selectmen of Carlisle*, 369 Mass. 755, 763, fn. 12 (1976), examination reveals that it contains no facts beyond the assertion that Ms. Murphy knew of the Union's excellent reputation and that it was not in any way involved with communists or any communist movement. The remaining assertions which bear upon her subjective state of mind are nothing more than conclusions and assertions of ultimate facts and therefore are wholly inadequate to create a genuine issue of material fact. *O'Brion, Russell & Company v. LeMay*, 370 Mass 243, 244-245 (1976); *Wagner v. Lectrox Corporation*, 4 Mass. App. Ct. 815, 816 (1976); *Berman v. Drake Motor Lines, Inc.*, Mass. App. Ct. Adv. Sh. (1978) 678 at 687; 10 Wright and Miller, Federal Practice and Procedure, § 2738 at 695-696.

[10] The affidavit also claims that this broadcast was part of the Station's "concerted effort to deliberately undermine the reputation of the police force in Ware, Massachusetts, and the IBPO, to inhibit the force's ability to function efficiently and effectively and to inhibit the IBPO's ability to act as the bargaining agent for the police force" (P. 104). Even if these conclusions as to general ill will are accepted as true, they are simply not material to the existence of actual malice. *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81, 82-83 (1967); *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966); *St. Amant v. Thompson*, 390 U.S. 727, 732-733 (1968).

The willful or reckless state of mind necessary to a finding of actual malice may be determined "on the basis of an inference drawn from objective evidence." *Stone, supra* at 868. The Union did not choose to put on the record any objective evidence to warrant such an inference, nor did it contest the facts placed on the record by the Station.[11]

Turning now to the constitutional standard, we note first that this Court has established a narrow test for determining the existence of actual malice.

> There must be sufficient evidence to permit the conclusion that the defendant *in fact entertained serious doubts as to the truth of his publication.*

St. Amant, supra at 731 (emphasis added).

Under this test, ill will or enmity is not to be considered, *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler,* 398 U.S. 6, 9-10 (1970); *Garrison v. Louisiana,* 379 U.S. 64, 78 (1964); *Beckley Newspapers Corp. v. Hanks, supra; Rosenblatt v. Baer, supra,* nor is intent to inflict harm. *Henry v. Collins,* 380 U.S. 356, 357 (1965) (per curiam). Failure to investigate the truth or to substantiate information gained is insufficient, in itself, to show actual malice. *Gertz v. Robert Welch, Inc., supra* at 332; *New York Times Co. v. Sullivan,* 376 U.S. 254, 287 (1964). There cannot be reckless disregard of truth where a false report is based upon a good faith, rational interpretation of something newsworthy. *Time, Inc. v. Pape,* 401 U.S. 279, 290-92 (1971). Nor does failure to seek out the plaintiff to verify facts constitute reckless disregard of truth. *Hurley v. Northwest Publications, Inc.,* 273 F. Supp. 967 (D. Minn. 1967), *aff'd on opinion below,* 398 F. 2d 346

[11] As the Supreme Judicial Court noted, if the Union required additional time or further discovery to learn of such evidence, it could have availed itself of the provisions of Mass. R. Civ. P. 56(f) relating to continuances for the purpose of gathering evidence (P. 39).

(8th Cir. 1968). Finally, reliance on information from a normally reliable and accurate source negates the possibility of actual malice. *New York Times Co. v. Sullivan, supra* at 287-288; *Miller v. News Syndicate Co.,* 445 F. 2d 356, 357-58 (2d Cir. 1971); *Trails West, Inc. v. Wolff,* 32 N.Y. 2d 207, 219 (1973); *Walker v. Pulitzer Publishing Company,* 394 F. 2d 800, 805 (8th Cir. 1968).

Contrary to the assertions of the Union at P. 21-22, Ms. Murphy did not agree that the Union was an "inroad of communism." At most, she agreed with the theoretical proposition that "if we do not get together and stop the inroad of communism, something will happen" (P. 93). Later, when Goodman stated that the inroad of communism was the Union, she advised him not to "stoop to a very low level" (P. 96-97). Still later in the same broadcast, Ms. Murphy expressed her belief that Goodman, in analogizing the Union's tactics to those of totalitarianism, had not identified the police with communists.

> Mr. Goodman did not say anything about the Police Department being Communist. What he said was the infringement upon a basic American Democratic right, and that is the right to free speech, is being infringed upon by this union, this International Union of Brotherhood of Police Officers that is coming in, and first of all telling the Chairman of the Board of Selectmen, an elected official of the taxpayers, that he cannot speak, and secondly, is now saying that the radio station, which is licensed to serve community needs is not doing that and is now on a, I believe the word is, vocal vendetta. . . . [A]s far as Mr. Goodman saying anything about the Police Department being communist, you're incorrect. What he

was saying is that this union is attempting to subvert the right to free speech. . . .[12]

(P. 99-100.)

Examples of conduct which may evidence "actual malice" are radically different from the foregoing and from anything the Union can offer. This is not a case where the defendants used a "calculated falsehood" or a "known lie." *Garrison v. Louisiana, supra* at 75. Nor is this a case ". . . where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call," or where ". . . the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation," or ". . . where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." *St. Amant v. Thompson, supra* at 732 (1968).

This is simply a case where the Chief Executive Officer of the Town of Ware aired his views; a contrary opinion was expressed by a member of the listening public; the Union itself was given an opportunity to respond on the very eve of the vote in issue; and the "profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open" was preserved and protected as well. *New York Times Co. v. Sullivan, supra* at 270. Clearly, Goodman's metaphor was "no more than rhetorical hyperbole, a vigorous epithet" which was a constitutionally protected part of the debate on a public issue. *Greenbelt Cooperative Publishing Assn., Inc. v. Bresler, supra* at 14; *Letter Carriers, supra,* 418 U.S. at 284.

[12] The Supreme Judicial Court found Murphy's remarks to be highly probative of a mind free of actual malice, based upon state rules of evidence (P. 38).

Conclusion.

For the foregoing reasons, the respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

By its Attorneys,

EVAN T. LAWSON,
HOWARD J. WAYNE,
LAWSON & WAYNE,
99 High Street,
Boston, Massachusetts 02110.
(617) 542-4010

Of Counsel:

MARK L. ROSEN, ESQUIRE,
SIFF & NEWMAN, P.C.,
233 Broadway,
New York, New York 10007.

Appendix A.

MASS. R. CIV. P. 56

SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at

the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy; and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits

to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.